

## Final Report of the TDR/Land Preservation Work Group of the Task Force On the Future for Growth and Development in Maryland: Part I

A transfer of development rights (TDR) program is a potent tool for helping Maryland meet its goals of preserving rural and resource land while concentrating development in growth areas. This report is a one-stop shop for basic information on TDR programs. There is a wealth of existing information on this important topic, and the Workgroup believed that directing the readers to that trove is better than creating its own primer on the topic. Part II of this report, to be completed in the coming months, will provide recommendations for improving non-TDR land preservation tools.

Perhaps the most thorough analysis of TDR programs in Maryland is Grant Dehart and Rob Etgen's *Report: The Feasibility of Successful TDR Programs for Maryland's Eastern Shore*, by Grant Dehart and Rob Etgen, and submitted to the Maryland Center for Agro-Ecology, Inc.,

The mission for the Work Group was based on two recommendations from *Where Do We Grow From Here? A Report of the Task Force on the Future for Growth and Development in Maryland* (December 1, 2008)

State and local governments should look at comprehensive approaches to land preservation beyond purchasing land for preservation. While additional State funding for such programs is critical, local governments should also strengthen land management tools (e.g., protective rural zoning and subdivision regulations) for rural lands to protect existing resource-based industries, thereby decreasing the incentive for land owners to sell their land for development. The Maryland Association of Counties believes, however, that this local government action should only be undertaken once the State has met its funding commitments to land preservation. Usually, successful down-zoning of agricultural land has been accompanied by aggressive easement acquisition, such as in Baltimore County.

And

MDP should convene an inter-agency and inter-governmental workgroup, including State and local stakeholders, to explore the viability of TDR programs at all levels. The workgroup should report back to the Task Force with an interim report by July 1, 2009, and a final report by November 1, 2009.

January 2007. It is a valuable work to which we are indebted. This report includes a checklist for creating TDR programs as well as a series of recommendations. We have included the checklist, and the recommendations of that report which form the basis of the first seven recommendations of this report.

This report examines interjurisdictional TDRs—i.e., programs that transfer rights from one jurisdiction into another. Such cooperation between jurisdictions can make TDR programs more effective. However, few such programs exist, and none in Maryland. The main obstacle is the lack of incentives for the receiving area to take the density from another jurisdiction. This report begins by describing programs that have overcome this obstacle, primarily in Washington state and New Jersey, then looks at Maryland's own Caroline County, where the creation of an interjurisdictional TDR effort is under discussion between the County and some of its municipalities.

Next, this report looks at promising innovations in TDR programs, where

the private sector purchases development rights not just for additional dwelling units but to address other environmental requirements, such as the need to offset the production of carbon dioxide and stormwater from new development.

Finally, this report lists a number of recommendations for improving TDR programs and other land preservation measures in an era when public dollars for preservation are scarce.

Appendix I contains the checklist for evaluating a local TDR program and its likelihood of success. Appendix II contains the updated TDR bibliography from the Interim Report.



## What is a Transfer of Development Rights (TDR) Program?

A Transfer of Development Rights program is a procedure, prescribed by local ordinance, whereby the owner of a parcel in a “sending area”—i.e., rural or environmentally sensitive land that is planned for preservation—may convey development rights to the owner of a parcel in the receiving district—i.e., where developed is desired and planned for—so that the development rights are extinguished on the sending parcel and may be exercised on the receiving parcel in addition to the development rights already existing.<sup>1</sup>

## Aspects of Successful TDR Programs

Pages 11 through 15 of *Report: The Feasibility of Successful TDR Programs for Maryland's Eastern Shore*, by Grant Dehart and Rob Etgen, published by the Maryland Center for Agro-Ecology, Inc., can be used for a checklist by jurisdictions creating or evaluating a local TDR program. This checklist appears in Appendix I. Since that report was written, two more authors, Rick Pruetz and Noah Standridge, looked at the twenty most successful TDR programs nationwide, not just in Maryland, to see which ones featured the ten attributes mentioned most often in their survey of twenty articles about what makes a successful TDR program. These are covered by the checklist in Appendix I, but the perspective and elaboration offered in “What Makes Transfer of Development Rights Work?” is worth summarizing here.

### Factor 1: Demand for Bonus Density

[M]any TDR programs fail because developers are satisfied with the density that they get for free without buying TDRs. When demand is inadequate, some communities consider downzoning the receiving area (rezoning the receiving area to allow less development potential as a matter of right) and requiring developers to buy TDRs to exceed that newly reduced baseline density. Downzoning is politically unpopular and likely to generate threats of lawsuits, particularly if the downzoning appears designed solely to create demand for TDRs. Downzonings are more acceptable when they restrict both sending and receiving sites and when the current zoning in the areas they affect is clearly failing to achieve the community's comprehensive plan. This was the case in Calvert County....<sup>2</sup>

Calvert County went through two countywide downzonings in the past decade. Rural areas are now zoned 1:20, and TDRs are required in development zones to build at the densities that were in effect there before the downzoning.

### Factor 2: Receiving Areas Customized to the Community

Features of receiving areas that need to be specially tailored to local circumstances include:

- 1) adequate infrastructure to accommodate the additional development;
- 2) political acceptability;
- 3) compatibility with existing development;
- 4) clear designation;
- 5) consistency with the comprehensive plan;
- 6) location where developers perceive a market for higher density; and
- 7) a receiving area located in another jurisdiction if the sending area is in a community that cannot accept more growth.

### Factor 3: Strict Sending-Area Development Regulations

<sup>1</sup> Adapted from a definition provided in the American Planning Association's Model Transfer of Development Rights Ordinance. *Model Smart Land Development Regulations*, Interim PAS Report, © American Planning Association, March 2006.

<sup>2</sup> This and the following excerpts in this section are from Pruetz, Rick, and Noah Standridge. “What Makes Transfer of Development Rights Work? Success Factors from Research and Practice.” *Journal of the American Planning Association*, Vol. 75, No. 1, Winter 2009, pages 78-87.

Only 2 of the 20 leading TDR programs we identified have sending-area zoning that allows development densities greater than one dwelling unit per five acres. Furthermore, these two programs are not among the most successful on our list. This suggests that although it may be possible to achieve limited success without strict sending-area zoning, permissive sending-area zoning will likely create serious problems for a TDR program. For example, permissive zoning produces greater potential development value, which can result in TDRs that are prohibitively expensive. ...A weak regulatory framework can also cause a landowner to question a community's commitment to preservation. For example, farmers could legitimately wonder whether it makes sense to preserve their land if permissive zoning will ultimately allow their farms to be surrounded by subdivisions whose residents may object to agricultural practices, noises, and odors.

Strict zoning predates TDR in some communities, but many have permissive zoning and find it necessary to downzone the sending area when they adopt a TDR ordinance. Most famously, Montgomery County, MD, downzoned its 90,000-acre sending area from a maximum of one unit per 5 acres to one unit per 25 acres. In fact, many communities adopt TDR specifically as a way to mitigate a downzoning.

#### Factor 4: Few or No Alternatives to TDR for Achieving Additional Development

A successful TDR program allows extra density in receiving areas only through TDRs and doesn't allow extra density for clustering, design improvements, extra amenities, etc.

Most successful programs rarely allow developments to circumvent TDR requirements. In the New Jersey Pinelands program, the State of New Jersey not only required the 60 jurisdictions to conform their codes to implement the regional TDR program, but the Pinelands Commission reviews and certifies all municipal zoning and land use ordinances and master plans for consistency with the Comprehensive Management Plan.

#### Factor 5: Market Incentives: Transfer Ratios and Conversion Factors

Many TDR programs use a one-to-one transfer ratio, meaning that for each dwelling unit precluded at a sending site, one bonus dwelling unit is allowed at a receiving site. At times, this formula can work for both landowners and developers. But it is also likely that the dollar value increase resulting from one additional dwelling unit in a receiving area will not equal the value reduction caused by preserving a relatively large amount of land in the sending area.

In an effort to create market incentives for sending-area landowners and receiving-area developers, many TDR programs adopt an enhanced transfer ratio, meaning that more than one additional dwelling is allowed in the receiving area for each dwelling unit precluded in the sending area.

A conversion factor is a benefit for using TDRs that involves something other than an increase in residential density: more commercial square footage, greater building height, increase in impervious surface, etc.

#### Factor 6: Ensuring that Developers Will Be Able to Use TDRs

If developers have met all the requirements of the TDR program, they should be allowed to achieve the maximum density in the receiving area by right without having to go through extra hearings or approvals to use the TDR's.

#### Factor 7: Strong Public Support for Preservation

Of the 20 leading TDR programs we reviewed, 13 exhibit strong public support for preservation by having at least one of the following: a locally funded purchase of development rights (PDR) program; another conservation funding program approved by county voters since 1988; or a TDR bank, which is a government entity that uses public funds to buy TDRs and hold them for resale to developers.

### Factor 8: Simplicity

Praised for its simplicity was Montgomery County's TDR program. Some complicated programs, such as interjurisdictional TDRs, are inherently complicated.

### Factor 9: TDR Promotion and Facilitation

[A] comprehensive, well-maintained webpage is a good indication of outreach to the general public. King County, WA, sets a high standard for promotion with regular press releases about TDR as well as a website with background information and access to codes. The New Jersey Pinelands website illustrates exceptional public outreach through a variety of recreational and educational programs aimed at school-age children as well as adults.

(See <http://www.state.nj.us/pinelands/> and <http://www.kingcounty.gov/environment/stewardship/sustainable-building/transfer-development-rights.aspx> ).

### Factor 10: A TDR Bank

A TDR bank is an entity officially authorized by the community to buy, hold and resell TDRs. Eleven of the 20 publications we reviewed discuss how having a TDR bank can enhance a TDR program. The bank can acquire TDRs from sending-area landowners who cannot find private buyers. It can establish and stabilize TDR prices. It can facilitate transactions. It can market the TDR program. It can create an ongoing preservation revolving fund by buying TDRs, selling them, and using the proceeds to buy more TDRs.



A TDR program can prevent rural land from being overwhelmed by development like this.



## Interjurisdictional TDR's

Maryland does not have any programs that transfer development rights from a County to a town or from one County to another. Yet this tool has great potential to shift development from conservation areas to growth areas. Some of the best interjurisdictional TDR programs are described below.

### Boulder County, Colorado

Development rights can be transferred from the non-incorporated portions of the County into the city of Boulder and six other cities in the County. Intergovernmental agreements between the County and each of the cities formalizes the arrangement.<sup>3</sup> The cities accept development rights from land nearby County land because “acceptance of TDRs achieves city goals for community separators, greenbelts, [and] farmland preservation.”<sup>4</sup> The city of Boulder and Boulder County together created *The Boulder Valley Comprehensive Plan* in 1977. It was updated five times since, and some minor changes were made as recently as 2008. Policy 11 of the Community Identity/Land Use Pattern section says the following:

The city and county will jointly determine criteria and areas for transfer of development rights (TDRs) within or in proximity to the Boulder Valley, in order to secure conservation easements on valuable rural lands from which density may be transferred and shift those rural residential densities to appropriate urban settings where the negative impacts of growth can be better mitigated or avoided.

The base density in sending areas is 1:35. Nonurban Planned Unit Development (NUPUD) allows two units per 35 acres on only 25% of the parcel (or 15%, where the Board of County Commissioners finds that the land is of agricultural or environmental importance. The “remaining acreage (the agricultural outlot) is encumbered by a conservation easement. The outlot remains in private ownership, but the conservation easement is deeded to the county.”<sup>5</sup>

The TDR statute for Boulder County lists the sending densities by parcel size, from

- (a) For parcels between 35 and 52.49 acres
  - (i) two development rights can be sent; OR
  - (ii) one unit may be sent AND one unit may be built on site, but only if specifically approved by the Commissioners based on a finding that the proposal enhances the preservation of the sending site and otherwise furthers the purposes of this Section 6-700 and the Comprehensive Plan.

To

- (g) For parcels 140 acres and larger
  - (i) two development rights per 35 acres can be sent; OR
  - (ii) any combination of transfer and on site development which does not exceed two units per 35 acres transferred or one unit per 70 acres on site (i.e., on 140 acres there could be the transfer of 6 units and the construction on site of 2 units).

<sup>3</sup> The map from the County's comprehensive plan maps showing the joint planning areas between the County and the seven cities can be found at [http://www.bouldercounty.org/lu/bccp/pdf/bccp\\_iga\\_map.pdf](http://www.bouldercounty.org/lu/bccp/pdf/bccp_iga_map.pdf)

<sup>4</sup> <http://conserveland.org/features/RickPruetz.ppt.pdf>

<sup>5</sup> [http://www.wulaw.wustl.edu/landuselaw/tldr\\_boul.html](http://www.wulaw.wustl.edu/landuselaw/tldr_boul.html)

Parcels with certain allocations of water rights can transfer another one unit per 35 irrigated acres.

Development requirements on receiving parcels include the following:

- (1) In order to be eligible for additional density from development rights, a property-owner must apply for and receive approval for a TDR/PUD on the parcel.
- (2) Adequate facilities and services must be provided to serve a TDR/PUD development.
- (3) Defined Subareas for transfer - For every TDR/PUD, 75% of the total number of development rights needed to complete the project must be acquired from designated sending sites located in the same subarea as the proposed receiving site unless the applicant proposes a specifically defined and identified sending area which is designated by the BOCC in the TDR/PUD approval.

The interjurisdictional TDRs in Boulder County preserved 5,900 acres by 2008.<sup>6</sup>

#### King County-Seattle, WA

This 1998 program, replacing an earlier, inactive program, transfers rights from rural parts of the County to its municipalities, where 1.4 million of the County's 1.8 million residents live.

The secret to getting municipalities to accept the extra density?

**“The program has provided incentives to the cities to accept TDRs with county funds for public amenities for transit enhancement, pocket parks and pedestrian or transit friendly street improvements in the receiving neighborhoods.”<sup>7</sup>**

Sixty-two rights were used to add 500,000 square feet to a Microsoft office complex.

“In 1999 and 2000 the City of Seattle and King County approved the Denny Triangle TDR Interlocal Agreement, allowing qualified landowners in the Cedar, Tolt, Green and Snoqualmie River Basins to sell TDRs to property owners in the Denny Triangle neighborhood of Seattle. This provided \$100,000 in county funds for amenities and a pledge of \$400,000 more for capital improvements when TDRs are transferred. Under the agreement, new buildings can build an additional 2,000 Sq. Ft. of residential space for each TDR transferred, and can add 30% to their maximum height. The county funds will be matched by developer contributions based on the additional square footage from TDRs.”

More information on the King County program can be found at

<http://www.kingcounty.gov/environment/stewardship/sustainable-building/transfer-development-rights.aspx>

According to the King County TDR Web site, one rural TDR can be purchased for two additional urban units. Between July 28, 2003 and November 30, 2007, the price per TDR ranged from \$10,000 to \$26,000. The most recent purchase occurred on November 30, 2007. The purchase of one urban TDR can be used for one additional urban unit. Between May 1999 and November 2007, prices per TDR have varied from \$5,000 to about \$17,000. The last urban TDR was purchased in November 2007.

<sup>6</sup> According to Rick Pruetz: <http://www.slideshare.net/ecocity2008/pruetzmc>

<sup>7</sup> This and the excerpt below are from Dehart, H. Grant, and Rob Etgen. *Report: The Feasibility of Successful TDR Programs for Maryland's Eastern Shore*. Submitted to the Maryland Center for Agro-Ecology, Inc. January 2007. Page 137.

“Since the year 2000, 137,500 acres of Rural and Resource lands or almost 215 square miles have been protected from development by King County's TDR Program.”

*The King County program has provided incentives to the cities to accept TDRs with county funds for public amenities for transit enhancement, pocket parks and pedestrian or transit friendly street improvements in the receiving neighborhoods*

Sending densities:

SENDING SITE ALLOCATION			
Type	Zoning	TDR	/acres
RURAL	F	1	80
	A	1	5
	RA-10	1	5
	RA-5	1	5
	RA-2.5	1	2.5
URBAN	R-1	4	1

#### Receiving Site Information

Once development rights from sending sites become certified, the sending site is protected from future development, and the TDRs are available to use at receiving sites, which are parcels of land located where the existing services and infrastructure can accommodate additional growth - typically in urban areas. TDRs may be used in several ways at qualified receiving sites:

- To increase density (typically 150%) above what is allowed by the base zoning;
- To increase Floor Area Ratios (typically 150%) above what is allowed by base zoning;
- To meet traffic concurrency requirements (if used in the same travelshed as the sending site)
- To allow construction of larger accessory dwelling units in the Rural Area; and
- Satisfy carbon offset requirements.

Basic criteria for receiving sites are outlined below. The TDR Code has the detailed criteria for receiving sites.

#### Areas qualified to receive TDRs include:

- Unincorporated King County urban areas zoned R-4 through R-48, NB, CB, RB, or O;
- Incorporated cities where allowed by the local jurisdiction; and
- Rural areas zoned RA-2.5 if TDRs originate in a Rural Forest Focus Area and all of the following conditions are also met:
  - The site is served by a domestic Group A public water service;
  - The site is within ¼ mile of an existing predominant pattern of lot sizes smaller than 5 acres;



- The project will not adversely impact regionally or locally significant resource or environmentally sensitive areas; and
- The project will not require public services and facilities to be extended in order to create or encourage a new pattern of smaller lots.

**The following areas cannot receive TDRs under any circumstances:**

- Properties on Vashon or Maury Islands;
- Properties within the Rural Forest Focus Area; and
- Properties within the outer boundaries of the Noise Remedy Area identified by Sea-Tac International Airport.

Zone	Description	Base Density (du/ac)*	Maximum Density (du/ac)
RA-2.5	Rural Area	0.2	0.4**
R-4	Residential	4	6
R-6	Residential	6	9
R-8	Residential	8	12
R-12	Residential	12	18
R-18	Residential	18	27
R-24	Residential	24	36
R-48	Residential	48	72
NB	Neighborhood Business	8	12
CB	Community Business	18	24
RB	Regional Business	36	48
O	Office	36	48
* du/ac = dwelling units per acre (see density)			
** Additional conditions apply as outlined above			

TDRs for Carbon Offset—Greenhouse gas emissions must be mitigated for new development in King County that exceeds a threshold for project-related greenhouse gas emission. The 2008 King County Comprehensive Plan stipulates that TDRs can be used for this purpose.

The County's transfer of development rights (TDR) bank can purchase and sell development rights, purchase conservation

easements, accept donations of development rights from qualified TDR sending sites, and provide funds for amenities that can facilitate interjurisdictional TDR agreements between the County and its municipalities. The TDR bank may acquire development rights and conservation easements only from sending sites located in the rural area or in an agricultural or forest production district as designated in the King County Comprehensive Plan. Development rights purchased from the TDR bank may only be used for receiving sites in cities or in the urban unincorporated area as designated in the King County Comprehensive Plan.

The rights associated with properties acquired for a county park, open space, trail, agricultural, forestry or other natural resource acquisition program can also go to the TDR bank if the property was a qualified TDR sending site.

TDR bank funds can be used to facilitate development rights transfers in a number of ways: “establishing and maintaining internet web pages, marketing TDR receiving sites, procuring title reports and appraisals and reimbursing the costs incurred by the department of natural resources and parks, water and land resources division, or its successor, for administering the TDR bank fund and executing development rights purchases and sales. The TDR bank fund may be used to cover the cost of providing staff support for identifying and qualifying sending and receiving sites, and the costs of providing staff support for the TDR interagency review committee.”

The County also operates a Web-based TDR Exchange to link buyers and sellers and provides TDR market information the site.

*Seattle and other cities have been receptive to accepting density transfers from rural parts of the county with TDRs, because there is a public recognition that there is a broader regional interest that serves everyone. They believe that development should occur inside of cities where the infrastructure exists, and that farms and forests are permanently protected with TDRs. The incentive payments built into the interlocal agreements, from county funds to pay for amenities and capital infrastructure in the receiver areas, help offset local concerns about the impacts of higher densities, but the receiver areas are typically within existing high-density communities.*

From Report: *The Feasibility of Successful TDR Programs for Maryland's Eastern Shore*. Submitted to the Maryland Center for Agro-Ecology, Inc., January 2007. Researched and written by: H. Grant Dehart, Land Preservation Consultant; and Rob Etgen, Executive Director, Eastern Shore Land Conservancy. Page 139.

Is the Washington experience transferable to Maryland? Grant Dehart and Rob Etgen, in their research on the Eastern Shore, summed it up this way:

**Whether the King County-Seattle experience with interjurisdictional agreements for TDRs could be transferable to the more rural environment of the Eastern Shore, will probably depend on a number of factors, including 1) the extent of regional cooperation between counties and municipalities for implementing comprehensive plans or shared land preservation goals, 2) the strength of the market for higher density development within municipalities, 3) the willingness of city officials to maintain a base level of density lower than this market while allowing higher densities only with TDRs, and 4) the willingness of county governments to provide financial and other incentives to municipalities willing to accept TDRs, to help pay for capital infrastructure and amenity enhancements within town boundaries to offset the impacts of higher density development.**

### The New Jersey Experience

#### A. The Pinelands

New Jersey differs from Maryland in that all the land in the state lies within the boundaries of the 566 municipalities. Counties do not have the role in land use that they do in Maryland, although they have control over storm drainage systems and county roads. Other than that, land use in New Jersey is a municipal matter. Therefore, TDRs transfer development from one part of a municipality to another part, or from one municipality to another. Interjurisdictional agreements are rare, however, because the receiving areas see little benefit from taking the density from another municipality. Interjurisdictional TDRs are most active in an area of New Jersey called the Pinelands.

The 1.1-million-acre Pinelands National Preserve was created by the U.S. Congress in 1978. Although the Pineland contains all or parts of seven counties and 56 municipalities, land use is controlled by the regional Pinelands Commission. Seven members to the Commission are appointed by the seven counties, seven by the governor of New Jersey, and one by the U.S. Secretary of the Interior. The Pinelands Protection Act that created the Preserve requires all municipalities in the Pinelands to allow the use of TDRs, transferred from any part of the Pinelands, for new development. TDRs in the Pinelands are called PDCs (Pinelands Development Credits). PDCs can be transferred between six counties and 33 municipalities (10 with both sending and receiving areas).

The Pinelands Commission adopted a Comprehensive Management Plan in 1980 dividing the planning area into a Preservation Area of 295,000 acres including the largest tracts of relatively unbroken forest and economically vital berry industry wetlands, and the surrounding Protection Area lands that had experienced some development. These areas were further divided into nine management areas, including three that qualified as sending areas for TDR, including the Preservation Area District, the Agricultural Production Areas, and Special Agricultural Production Areas. The Comprehensive Management Plan was approved by the Secretary of the U.S. Department of Interior and reviewed by Congress in 1981. After municipal plans were prepared in conformance with the Comprehensive Management Plan, residential development was not allowed as-of-right in these areas, except through a conditional use approved by the local jurisdiction. [Members of families that have lived in the Pinelands for twenty years, or people who earn their living from Pinelands resources, can build houses by-right.]<sup>8</sup>

The Pinelands Commission's Web site provides the following information:

- Each PDC transfers the right to build four homes and can be bought and sold in 1/4 (or 1 right) increments.
- Sending areas include preservation and agricultural areas. PDCs may also be allocated to other properties that can't be developed because of environmental problems. Conservation or agricultural easements are placed on the sending properties when the PDCs are transferred.
- Allocations to sending properties range from 0.2 PDCs for each 39 acres of undevelopable wetlands, to two PDCs for each 39 acres of upland farmland or active berry agriculture.
- Receiving areas consist of Regional Growth Areas where zoning allows roughly 50% more homes to be built using PDCs than would otherwise be permitted (originally estimated to be 22,500 bonus units/46,200 base units). However, since the program is voluntary and not all

<sup>8</sup> Report: The Feasibility of Successful TDR Programs for Maryland's Eastern Shore. Submitted to the Maryland Center for Agro-Ecology, Inc., January 2007. Researched and written by: H. Grant Dehart, Land Preservation Consultant; and Rob Etgen, Executive Director, Eastern Shore Land Conservancy. Pages 141-142.

developers will use PDCs, there are roughly twice as many opportunities to use PDCs as there are PDCs available for use. As a result, the Commission estimates that only 6,600 additional housing units will be developed with PDCs.

- PDCs can also be used by property owners in other areas of the Pinelands to build homes on certain lots which are slightly smaller than normally required or which involve slight deviations from development standards.
- PDCs can be bought and sold privately or through the publicly chartered Pinelands Development Credit Bank. <http://www.state.nj.us/dobi/pinelands/pinelandsbank.htm>. While most PDCs are sold to developers, the state began instituting programs in 1999 to buy and retire PDCs, removing them from the market.

### ***Receiving Area Zoning***

- Municipalities designate residential, commercial, and industrial zones within regional growth areas.
- Residential zones have an assigned base density (amount of development permitted without PDCs) and a maximum permitted bonus density (amount of development permitted with PDCs).
- The number of homes which a developer wishes to build on a given parcel of land will determine how many, if any, PDCs are needed.

### ***Status of the Program (05/18/09 from the Commission's Web site)***

- 10,812 transferable development rights (equivalent to 2,703 PDCs) have been formally allocated through Letters of Interpretation issued by the Pinelands Commission.
- 637 projects using PDCs have been built or approved, or are awaiting approval. These involve 4,671 development rights, or 1,167.75 PDCs.
- Approximately 7,008 rights have been officially severed (or removed) from sending properties, protecting more than 59,720 acres of important conservation and farm land.

## **B. The Burlington County Transfer of Development Rights Demonstration Act**

After the success of TDRs in the Pinelands, the New Jersey Legislature passed the Burlington County Transfer of Development Rights Demonstration Act in 1989, which allowed any town or city in the County to create a TDR program with the County's permission. Two Burlington County townships, Chesterfield and Lumberton, created TDR programs.

In 2000, Chesterfield Township contained 2,614 residents in 924 dwellings on 21.6 square miles. The 560-acre receiving area, Old York Village, will remove 1,408 development rights and ultimately preserve 7,525 acres of rural land. After selling the TDRs, a landowner can build up to one unit per 50 acres. As of March 2009, TDRs had preserved 2,142 acres and TDR contracts would preserve 660 more. With another 4,670 acres preserved by PDRs, the Township has preserved 7,412 acres so far.<sup>9</sup>

<sup>9</sup> For this and more information, see "Transfer of Development Rights—Chesterfield Township: A Case Study." PowerPoint presentation, New Jersey Highlands Council, March 5, 2009. Can be downloaded from [http://www.highlands.state.nj.us/njhighlands/hdcbank/chesterfield\\_pres\\_030509.pdf](http://www.highlands.state.nj.us/njhighlands/hdcbank/chesterfield_pres_030509.pdf)

Old York Village is a neo-traditional development, which is a great way for making density acceptable to existing residents in the receiving zone. **The importance of creating desirable, attractive places in receiving areas cannot be overemphasized.** Residents of receiving areas must believe that the new development is adding to their quality of life, not just adding more of the same old blah that they despise. In his excellent presentation called “Getting What You Want in the Receiving Area,” Robert F. Melvin, PP, AICP, explains, “in the fight against sprawl, it’s mixed use cores to the rescue.” (See <http://www.state.nj.us/agriculture/sadc/tdr/resources/tdrsummit07melvin.pdf> )

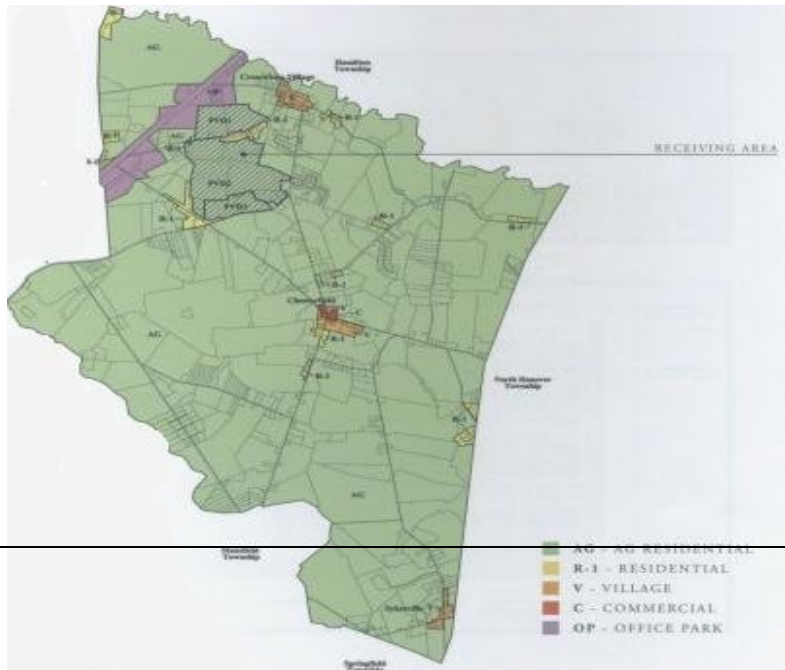
Neo-Traditional Development in Old York Village, the receiving zone for Chesterfield Township, Burlington County, New Jersey:

Development within the planned village will be guided by site planning and architectural design standards which have been incorporated within the Township’s zoning ordinance. The site planning standards address the spatial relationships between buildings and the roadways, streetscape elements and open spaces which form their context....



<http://www.chesterfieldtwp.com/Smart%20Growth/Smart%20Growth%20Page.htm>

Chesterfield Township, with TDR Receiving Area shown





<http://www.chesterfieldtwp.com/Smart%20Growth/Smart%20Growth%20Page.htm>

Old  
York  
Village  
Plan



[http://www.clarkecatonhintz.com/news\\_62/cch.pdf](http://www.clarkecatonhintz.com/news_62/cch.pdf)

*Chesterfield Township maintained a multiyear effort that brought citizens and developers together to meticulously plan and rezone a receiving area for a pedestrian-friendly, smart-growth village. The extensive public involvement promoted acceptance and the rezoned land gave both citizens and developers certainty about where and how growth would occur. This certainty is a significant benefit to developers who do not have to apply for rezoning but are assured of exactly what they can build if they follow all the rules, including compliance with the TDR requirement.*

Rick Pruetz, AICP, and Noah Standridge, "Plan-Consistent TDR." *Zoning Practice*, Issue #9, American Planning Association, September 2009.



### C. The State Transfer of Development Rights Act of 2004 (New Jersey).

Following the success of TDR programs in Burlington County, the New Jersey state legislature passed the State Transfer of Development Rights Act in 2004.

The governing body of any municipality must complete the following to create an intra-municipality TDR program:

- Draft and adopt a transfer development plan element to be included in its master plan:
  - Include an estimate of anticipated population and economic growth for the next 10 years;
  - Identify and describe all prospective sending and receiving zones;
  - Analyze how the anticipated population growth is to be accommodated in the municipality and in the receiving zones;
  - Include an estimate of existing and proposed infrastructure of the receiving zone;
  - Provide a procedure and method to transfer development rights from sending to receiving zones; and
  - Provide explicit planning objectives and design standards to govern the review of applications for development in the receiving zone.
- A capital improvement program for the TDR receiving area, identifying necessary infrastructure improvements.
- A utility service plan for the municipality that specifically addresses the TDR receiving area so that no development in this area is delayed by lack of service
- Complete a real estate market analysis which explores the potential in both the sending and receiving zones, with respect to capacity and market demand (likelihood of TDR usage in receiving zone)

The governing bodies of two or more municipalities may enter into a TDR agreement. Each must follow the above steps.

#### ***Requirements for the Sending Zone***

Lands in a sending zone must meet one of three criteria:

- Agricultural land, woodland, floodplains, wetlands, threatened/endangered species habitats, aquifer recharge land, recreation or parkland, waterfront, steeply sloped or other lands where development activity is restricted;
- A distinctive aesthetic, architectural or historic point of interest; or
- Other areas that should remain at low densities due to a lack of infrastructure availability (inadequate transportation, sewer service, etc.).

Lands in a sending zone may already be permanently restricted under a conservation easement.

Density bonuses may be assigned to individual sending zone properties in order to expedite or prioritize protection of those lands.

### ***Requirements for the Receiving Zone***

Lands in the receiving zone must:

- Be large enough to accommodate all development potential from the sending zone;
- Have a realistic development potential with respect to infrastructure, zoning densities and local market demand;
- Be consistent with county and regional plans;
- Have existing or planned utility service so as not to delay the purchase of any transferrable development rights; and
- Mandate that only TDRs may be used for density increases.

### ***Review by County, State officials***

After completing the steps to draft a TDR plan, the county planning board and State Office of Smart Growth conduct a review for compliance with the guidelines of the state TDR act and existing municipal, county, regional and state development plans. After three years, the program must be updated (new real estate analysis, infrastructure survey) and reviewed by the county. Another review is conducted after five years. If after five years, at least 25% of the development potential has not been transferred, one of the following must occur: a) the municipality must purchase the difference in potential; b) sending area landowners must agree to keep the program; c) municipality can demonstrate expected success and attribute shortcomings to a low demand (planning board and/or Office of Smart Growth must concur); or d) less than 25% of sending area has been for sale during the five year period.

The state provides incentives in the form of streamlined approvals and assistance with other departments (housing, environmental protection, public utilities, etc.) The Office of Smart Growth provides technical and financial assistance to municipalities creating new TDR programs.

It must be noted, however, that few if any TDRs are sent to another jurisdiction because no one wants to be a receiving area without help to offset the costs associated with the extra density: public services, infrastructure, amenities, etc.

Grant Dehart and Rob Etgen again assess the applicability of New Jersey's program to Maryland:

**While this may appear to be an onerous set of requirements for the adoption of a local TDR program, this examination of Maryland TDR programs suggests that those that have not been successful in protecting much land would likely have been more successful if they had followed the New Jersey State TDR planning requirements, or they might never have been established at all.**

**This observation raises the question of whether the State of Maryland should adopt similar requirements and standards for establishing county and municipal TDR programs, that together with technical assistance from the Maryland Department of Planning, could help ensure that new TDR programs will be successful. While local TDR programs should be optional and tailored to the unique real estate market, land use regulations and politics of each county, the**

lack of a model or guidelines for TDR programs in Maryland has inhibited the success of this mechanism in most of the counties that have adopted it.

The New Jersey TDR law has a few key requirements that should be considered by Maryland in establishing more specific guidelines or requirements for county TDR programs. These include Sections:

9.e. In receiving zones, *“no density increases may be achieved in a receiving zone without the use of appropriate instruments of transfers.”*

11.c. *“The restrictions (of the sending parcel easement) shall be expressly enforceable by the municipality and the county in which the property is located, any interested party, and the State of New Jersey.”*

20. *“The failure to maintain plan endorsement status or the failure to have transferred a sufficient degree of development potential within five years constitutes a rebuttable presumption that the development transfer ordinance is no longer reasonable.”*

At a minimum, New Jersey’s State Transfer of Development Rights Act is a must-read for any county anticipating the adoption of a new TDR program, as a checklist for the kind of planning and analysis that should be done.



## **Interjurisdictional TDR Effort in Caroline County**

Caroline County has a TDR program. The County's own proposed receiving zone is located between Denton and Greensboro. According to the draft comprehensive plan, however, "it has been determined that currently there is not enough area designated in the County's TDR Receiving area to accommodate all TDR sending rights available...."

As a result, the draft comprehensive plan "establishes a goal to work with the towns to identify inter-jurisdictional growth areas that could be served by a wastewater treatment system. These new areas could accommodate the remaining TDR Sending rights depending on modifications to the County's existing TDR Program, or the development of a separate TDR/PDR Program. In addition to these new areas, the County will continue to work towards developing a mutually beneficial inter-jurisdictional growth program with the Towns that would provide growth guidelines for town growth areas, County growth areas and land preservation" (page 22).

An injurisdictional agreement does not exist yet, but the towns of Denton, Greensboro, and Templeville are interested, and the County is working with them. Denton is closest to reaching an agreement with Caroline County. In an interjurisdictional agreement, the County would propose using the Towns' growth areas as receiving areas for development rights transferred from County land. Developers would have the option of paying a "fee in lieu" to the County instead of actually buying and using TDRs that the code would require. The County would then use the funds to buy PDRs or TDRs.

The municipal growth element, which is required in town plans, opens the door to the conversation on interjurisdictional TDRs. The municipal growth element makes the towns think about future zoning densities and how much could be achieved through the use of TDRs.

The big question, as always, is: how can the towns benefit by accepting extra density through TDR? In exchange for taking the growth, the County would—according to the proposed plan actions—concentrate land preservation funds in creating greenbelts around the Towns, which the towns see as a great amenity: properties adjacent to the towns would be "a higher priority for land preservation to help permanently establish the edge of development" (page 23). In addition, the County would more readily agree to sewer and water extensions into annexed areas. Denton actually reduced the size of its growth area, meaning that it is willing to see higher densities and smarter growth within its boundaries.

In addition, the County would work to create design standards in TDR receiving zones, which is a strategy recommended in the final report of the Workgroup on Land Preservation and TDRs.

## The Plan-Consistent Transfer of Development Rights

It is useful to point out that not all TDR programs require the designation of new receiving areas with new densities, and all the analysis and opposition that such an effort may involve. As planners Rick Pruetz, FAICP, and Noah Standridge point out:

Admittedly, adoption of a TDR program can be a long, labor-intensive process when it requires increases in the development limits depicted in a community's current general plan. However, many communities prefer a TDR mechanism that requires no changes in the future density described in their general plans (typically depicted in future land-use maps or general plan maps). We distinguish this "plan-consistent" TDR approach from a more ambitious process that calls for increases in general plan densities, often triggering infrastructure studies, extensive environmental review, and community resistance. In contrast, plan-consistent TDR works within the development limits of the current general plan through a simple requirement, described below, which is inserted into the zoning code.<sup>10</sup>

In short, if your plan already calls for the eventual upzoning of certain areas to accommodate growth, you can require the use of TDRs to achieve the new zoning instead of just giving it away. Since the higher density is already in the plan, it is likely to arouse less opposition than creating new receiving areas for new, higher densities. (A variation on this approach to the plan-consistent TDR is to do what Calvert County did: downzone the growth areas and require TDRs to get back to the original density.)

Pruetz and Standridge propose a four-part test to see if your jurisdiction may be ripe for a plan-consistent TDR:

- Question 1: Does your community often receive applications for upzonings?
- Question 2: Does your community's current general plan indicate an adequate number of areas appropriate for future upzonings?
- Question 3: Are the existing zoning restrictions for the areas you want to preserve adequate to discourage inappropriate development?
- Question 4: Is your community willing to require compliance with TDR requirements for all (or most) development in excess of current zoning limits?

"...a plan-consistent TDR program does not require any changes to the development capacity of the existing general plan, meaning the depiction of those areas suitable for an eventual upzoning. This saves communities the time and expense of conducting new infrastructure and environmental studies as well as countless meetings dealing with residents' concerns about general plan revisions."

<sup>10</sup> Rick Pruetz, AICP, and Noah Standridge, "Plan-Consistent TDR." Zoning Practice, Issue #9, American Planning Association, September 2009.

## The Next Generation of Transfer of Development Rights Programs

### A. Emerging ecosystem service markets

On the horizon are several opportunities to conserve and restore land using financial incentives generated for ecosystem service markets. These incentives can complement TDR programs by interlacing additional conservation tools within TDR sending areas. To take advantage of these opportunities, TDR programs should establish sending areas that have a high potential to generate marketable ecosystem services.

Traditionally, goods produced from nature, such as fish, timber, crops, and other natural commodities have monetary value and are exchanged for a price between buyers and sellers. Natural systems also provide many services that are essential for supporting life on earth, human health and well-being, and economic systems. These services include reduction of greenhouse gases through carbon sequestration in soils and trees, production of clean water and air and prevention of soil erosion by forests and wetlands, and support of diverse wildlife and plant communities that are part of many outdoor recreational activities. In most instances, landowners who own the lands and waters that provide these services are not compensated for the ecosystem service benefits provided to the public. New financial incentives are developing that can be used to pay landowners for the services their lands provide for the public good. The terms “carbon credits” or “habitat banks” describe how these services are now being looked at as environmental assets with true monetary value.

These ideas are also being explored in Maryland. The Bay Bank, under development by the Pinchot Institute of Conservation, will be a centralized and comprehensive marketplace linking landowners to existing and new ecosystem service markets. The Bay Bank is currently pursuing five distinct ecosystem markets:

- Carbon Sequestration: credits for removing carbon from the atmosphere.
- Forest Conservation: credits for maintaining and enhancing forest lands.
- Habitat Conservation: credits for maintaining habitat critical for protecting endangered species or high value habitats. Early efforts are focusing on Delmarva fox squirrel habitat and brook trout stream systems.
- Water Quality Protection: credits for reducing water pollution.
- Wetland Conservation: credits for maintaining and enhancing wetlands.

In addition, state agencies are also developing new programs that will promote market development. The Maryland Department of Agriculture and the Maryland Department of the Environment are co-sponsoring a Maryland Nutrient Trading Program designed to work between farmers and waste-water treatment plant operators. Maryland’s Greenhouse Gas Emissions Reductions Act of 2009 requires that the state develops a carbon offset program to assist in meeting the 25% greenhouse gas reduction goal by 2020. This effort is being led by the Maryland Department of the Environment.

Key to supporting TDR programs is the strategic co-location of TDR sending areas with areas that have high potential to generate ecosystem service credits. For example, habitat conservation banks and credits can only be developed in areas that harbor the target species. Restrictions,



such as these, can help focus appropriate areas for TDR sending area selection. Attention paid to location will leverage the greatest benefits possible from these emerging ecosystem service markets.

(For more information, please see Bay Bank: The Chesapeake's Ecosystem Service Marketplace: [http://www.pinchot.org/gp/bay\\_bank](http://www.pinchot.org/gp/bay_bank) and Maryland Department of Agriculture, Maryland Nutrient Trading Program: <http://www.mdnutrienttrading.org/> .

#### B. Opportunities for beginning a Statewide or Inter-jurisdictional TDR program: Leveraging Transit Oriented Development (TOD) Sites and Base Realignment and Closure (BRAC) Zones

A statewide or inter-jurisdictional TDR program would involve inter-jurisdictional trading between Counties on a regional or statewide basis. The benefits of inter-jurisdictional trading could promote broad, landscape-scale conservation across jurisdictional boundaries in the most important natural resource and rural resource areas and could help focus high-density development in appropriately located—and appropriately designed—Smart Growth areas. A critical element underpinning successful TDR programs is the creation of a strong market for development rights, where there is a competitive balance between the demand for density credits and the supply. In many instances, the demand side of the market is weak. In order to ensure the success of statewide or interjurisdictional TDRs, State and local governments will need to collaborate to ensure that sufficient demand for TDRs exists in proposed receiving areas. Two of these opportunities present themselves through Transit Oriented Development (TOD) sites and through the Base Realignment and Closure (BRAC) Revitalization and Incentive Zone Program. [Opportunities to designate other types of receiving areas should be informed by ongoing efforts to identify targeted growth areas— and state and local funding efforts to support them.]

#### TOD sites:

- Transit Oriented Development (TOD) is an approach to development that encourages relatively dense, mixed-use, pedestrian friendly development within a walking distance (¼ to ½ mile) of a transit station. The State has a robust program of helping promote and implement TOD across a variety of its 106 existing station areas, and works closely with local governments to ensure that these and future transit facilities are supported with appropriate land uses. Six of these project areas were designated as “Smart Sites” in June 2009, and many more still are subject of collaborative effort between state and local agencies to examine potential redevelopment. These sites are intended to produce compact, mixed use development that will spur economic development, support the use of the transit system, and be a model for Smart Growth development across Maryland.
- The unique opportunity with the TOD Smart Sites is that
  - There is generally a reasonable share of publicly owned land;
  - There are existing strong partnerships between state and local agencies;
  - The existence of transit makes it possible and desirable to build at higher densities and the development can support transit ridership. As a designated Smart Site, the State will have already agreed to make this Zone a priority for State Investment making it more equipped to accept the increased density; and
  - The designation of a “Smart Site” reflects a commitment among multiple State and local agencies to help align resources towards the achievement of TOD goals.

- Transit spans a wide variety of Maryland communities, and its use benefits residents across the state by helping reduce congestion, carbon emissions, and other kinds of transportation-related environmental degradation. While Smart Sites address only a sampling of current rail station areas, the potential exists to expand the approach to include a broader array of communities and types of transit facilities, to include smaller municipalities in rural areas as well as urban centers. While initial focus for receiving areas could target the specifically targeted TOD site, the program could expand to include receiving areas beyond the immediate TOD zone.

Inclusion of any given TOD site or project would need to be preceded by in-depth market analysis to ensure that the agreement could be balanced against the market realities of the station area, and the capacity of State and local governments to provide adequate subsidy.

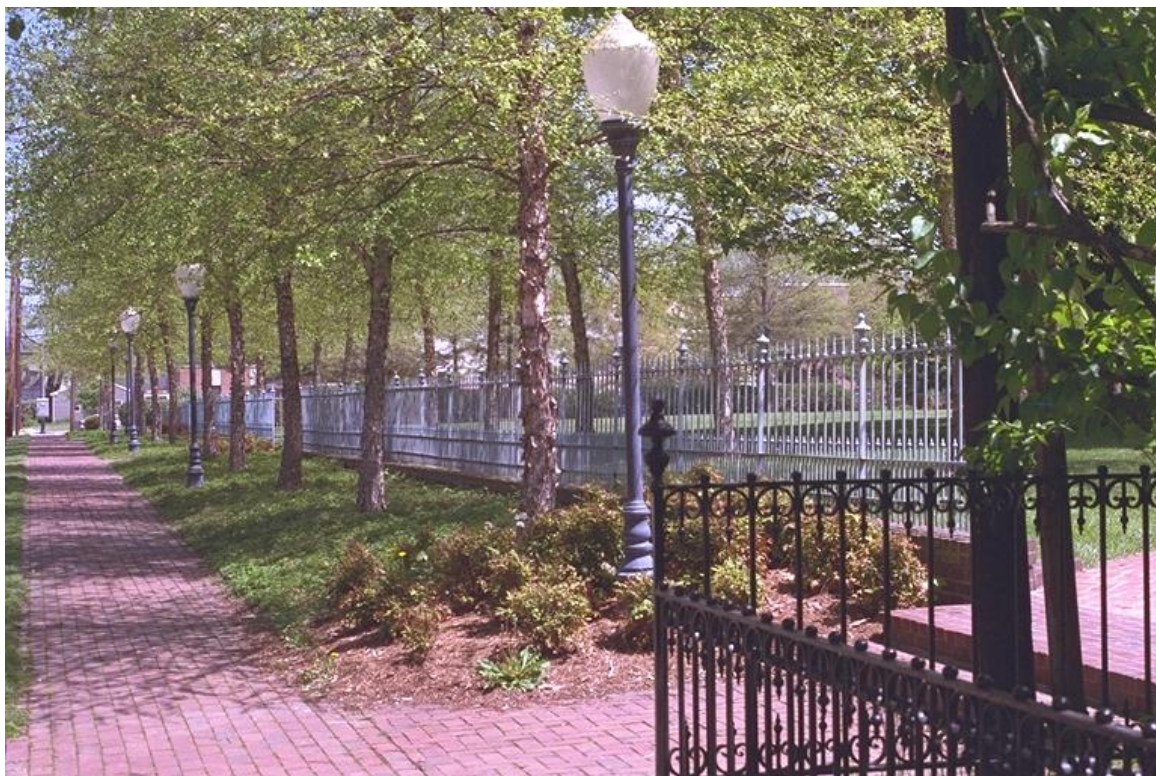
- The types of investment could include transportation funds, water and sewer funds, school construction and investment, community investment funds and other tax credit options.

#### BRAC Revitalization and Incentive Zone Program:

- The BRAC Revitalization and Incentive Zone (SB206 BRAC Community Enhancement Act) is intended to focus growth in areas that are already designated for growth; provide local governments with financial assistance for public infrastructure in these well-defined areas; and align other State resources and programs to local governments and businesses located in the BRAC zones for a coordinated State effort on making the zones the focus of BRAC growth.
- The benefits of BRAC Zone designation to a local jurisdiction includes:
  - Payment of 100% of state real property tax increment on qualified properties;
  - Payment equal to 50% of the local jurisdiction's real property tax increment on qualified properties;
  - Use of funds to pay back bonds, including Tax Increment Financing bonds, issued for infrastructure improvement in the Zone; and
  - Priority consideration for financing assistance for projects or operations from various state agencies.



What do we mean by density, mixed uses, and amenities suitable for a TDR receiving zone? Some examples, though not the only ones, already exist in traditional small towns such as Chestertown.



## Recommendations

In keeping with our theme of not recreating the wheel when such valuable information on TDRs already exists, the TDR/Land Preservation Work Group endorses the recommendations made in Grant Dehart and Rob Etgen's Report: *The Feasibility of Successful TDR Programs for Maryland's Eastern Shore* (The Maryland Center for Agro-Ecology, Inc., January 2007), excerpted below. Although the report examines the Eastern Shore specifically, the recommendations are applicable to TDR programs in general. These recommendations are numbers 1 through 7 below.

### **1. Counties considering the adoption of a new TDR program or enhancement of an existing program should evaluate the Criteria for a Successful TDR Program.**

[These are reproduced in Appendix I.]

### **2. State actions could help facilitate successful TDR Programs.**

With Maryland's dominant success in preserving land with TDRs compared to other states, there should be an opportunity for the State of Maryland to provide more guidance... that will help local governments evaluate, design and adopt TDR legislation. The lessons from successful programs in Calvert and Montgomery County and unsuccessful experiences in the other counties demonstrate the need for this guidance. ...

The State should update its "Models and Guidelines" report on creating TDR program as well as other guidance, and become more active in providing technical assistance to local jurisdictions.

### **3. Counties should recognize that TDRs are a valuable commodity. Counties with TDR programs are advised to require TDRs for any upzoning to increase density for new development projects, and work with municipalities to incorporate TDRs into new annexations and infill redevelopment.**

Most parties interviewed in all six counties during this study agreed that local governments should have a policy not to increase zoning density for new development in counties with TDR programs, without requiring that all or a major part of this increase in density be accomplished with TDRs. This kind of policy has helped create a demand for TDRs in both Montgomery and Calvert County, and has been adopted by Charles County. Counties [are advised to] require the use of residential TDRs for zoning increases in the size or floor area of commercial and industrial uses to generate TDR demand.

As a former chairman of the Montgomery County Planning Board and former developer once said:

*... There's no market if the land is actually zoned to the density you're willing to allow. It's time we stopped giving away zoning for free and started making developers pay for favorable zoning.<sup>11</sup>*

### **4. Counties are advised to protect TDR sending sites with permanent conservation easements, rather than deed restrictions that are less than permanent.**

<sup>11</sup> William Hussmann, Former Chairman of the Montgomery County Maryland Planning Board, to visiting group of Michigan legislators, quoted in the Michigan Farm Bureau's web site after the visit.



Restrictive covenants as a land preservation instrument provide limited protection. Such restrictions can be extinguished by property foreclosures or other events. If a landowner that has sold TDRs is able to restore development rights to a sending parcel, or if a local government removes such restrictions from TDR sending sites, such actions will likely undermine public confidence in the TDR program and other deed restrictions on protected lands.

**5. TDR programs need to serve the goals and objectives of Local Comprehensive Plans. The primary purpose of TDR programs is to preserve valuable farmland, natural areas and open space. New growth or development should not be planned merely to create more demand for TDRs.**

Rural Maryland is a special place. Our large agricultural sector needs to remain competitive in today's world markets while re-establishing local and value-added markets to provide economically and environmentally sensitive products. While it is essential that these activities continue to create and sustain economic and social development by providing jobs and revenue, and enhancing the welfare of the state and local areas, they should not diminish the special historic character of our towns and villages, Rural Legacy and Heritage Areas, and wildlife preserves.

A significant change in the character of Rural Maryland should not be the price of having successful TDR programs. Some counties may choose not to adopt a TDR program, if the impact of new development using TDRs in receiver areas is too great, or if such development is not supported by local communities and their elected leaders. They may decide that other tools for land preservation, including PDRs and protective zoning, can preserve as much or more land without the problems or citizen opposition often associated with using TDRs for development.

**6. Counties should seek to preserve farmland, natural resources and open space by limiting development through zoning, to help ensure a successful TDR program while redirecting development pressure away from rural areas.**

Success with TDRs is more likely in counties that have zoned rural lands to protect agricultural and natural resource lands by limiting allowable residential densities.<sup>12</sup>

**7. Counties with TDR programs are advised to establish procedures to monitor, review and periodically adjust the design of the program and the zoning for sending and receiver areas, in order to maintain TDR demand and ensure that the goals of the program are being met.**

Few if any TDR programs are perfectly designed or 100% complete when they are adopted. Successful programs do not remain static after they are adopted. Local governments should not refrain from adopting a program if it can be improved over time and adjusted to maintain a balance of supply and demand, based on actual experience during implementation. TDRs values will fluctuate with this demand and with the overall real estate market. As one farmer in Cecil County expressed it:

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<sup>12</sup> MDP agrees with the recommendation in *The Feasibility of Successful TDR Programs for Maryland's Eastern Shore* that protective zoning of "1 dwelling per 20 acres or more, as in Baltimore, Calvert, Caroline, Kent, and Montgomery County" is desirable. The Maryland Association of Counties disagrees, and believes that downzoning should be accompanied by more significant land preservation funding from the State.

*My theory is that you are not going to start off with a perfect program right off the bat. You have to pass something and then start tweaking it from there, because if you try to pass a perfect program right off the bat, you'll be there 10 years from now and still not have a program.*

In addition to these recommendations from the Dehart/Etgen report, the TDR/Land Preservation Work Group makes the following recommendations, relating to TDRs, PDRs, and other land preservation tools.

**8. The State should consider allowing densities of 3.5 units per acre in Priority Funding Areas to be achieved through TDRs added to a lower base density, in some instances.**

Traditional settlement patterns and market demand in some Counties may make the PFA density requirement of 3.5 units per acre the upper limit to what will be built. Allowing additional density through the use of TDRs would then be fruitless. Therefore, in County PFAs that can be built out at 3.5 units per acre, it would make sense to allow a lower base density in the PFA, with the extra units added through the purchase of TDR. Calvert County allows only one unit per acre without TDRs, which creates a great incentive for buying TDRs because no one is doing development of one-acre lots in the PFA. Calvert allows up to 14 units per acre in its PFAs. For jurisdictions where density that high is not common, the base density could be set at one unit per acre, with TDRs required for 2-4 units per acre and waived at higher densities where TDRs are harder to justify financially (e.g., 10 -20 units per acre).

**9. Receiving areas should be designed so that residents see the added density as improving their quality of life instead of detracting from it.**

Receiving areas often encounter stiff opposition because residents don't like the type of development they were getting in the past and do not want TDRs to create even more of it. Public involvement in creating receiving areas—for example, a public charrette process—can make residents feel like partners in rather than victims of the development process. The result can create not mere subdivisions but desirable places, high quality, high density, mixed use, amenity-filled neighborhoods. Higher density stops being an issue.

Form-based codes may be one helpful tool for creating desirable TDR receiving zones. For one of many examples of a form-based code, see the Town of Denton Pattern Book (the file is big—over 61 MB): <http://rja-ltd.com/Denton%20Pattern%20Book%20March%202007.pdf>

*The importance of creating desirable, attractive places in receiving areas cannot be overemphasized*





Growth in TDR Receiving areas can occur in ways that the public will support.<sup>13</sup>



<sup>13</sup> Photos of houses on this page are from Melvin, Robert F. "Getting What You Want in a Receiving Area." Melvin | Kernan Development Strategies. <http://www.state.nj.us/agriculture/sadc/tdr/resources/tdrsummit07melvin.pdf> The houses are in Washington Township (now called Township of Robbinsville), Mercer County. They were built using TDRs. The photo of the mixed-use commercial/residential area comes from MDP's image bank.



Residents may not accept receiving areas that look like this.



Photographs on this page are from MDP's image bank.

10. Counties and municipalities are advised to use the municipal growth and water resources planning processes as an opening for discussing interjurisdictional TDRs. Sewer and water capacity are a big obstacle to increasing density; with this issue in hand, and with Counties and municipalities in agreement over the extent of annexations and the density of development on annexed land, Counties and their municipalities might as well build on that foundation by broaching the topic of TDRs.

## Appendix I: Checklist for a Successful TDR Program

Pages 11 through 15 of *Report: The Feasibility of Successful TDR Programs for Maryland's Eastern Shore*, by Grant Dehart and Rob Etgen, published by the Maryland Center for Agro-Ecology, Inc., contains the following excerpt that can be used for a checklist by jurisdictions creating or evaluating a local TDR program:

### Criteria for a Successful TDR Program

Based on these findings from TDR Program Profiles in Maryland, New Jersey and Washington State, and an earlier draft of Measures of a Successful TDR Program reviewed and discussed by the principal investigators with the Technical Advisory Committee, the following key criteria were developed and used in evaluating the feasibility of successful TDR programs in selected Eastern Shore counties. A summary checklist of these criteria was developed, applied to each of the counties in the Eastern Shore assessment area and included as an attachment to each of the TDR Program Assessments. Three counties had existing TDR programs, Caroline, Queen Anne's and Talbot, but Caroline's has been revised and reenacted. These criteria could be used to help other counties evaluate ways to improve existing programs, or to help those counties that are designing new TDR programs avoid problems that have inhibited program performance in some Maryland counties. These criteria are listed generally in the order that the principle investigators believe are most important to TDR program success. It is unlikely that any county will have a perfect program, or a 100% score when measuring their TDR program with these criteria. However, those that cannot meet many of these performance measures are unlikely to have success, and some criteria tend to be more essential than others. Successful TDR Programs are characterized by the following features:

#### A. TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals. They are characterized by:

- A balance of supply and demand for TDRs has been created in the design of the TDR program.
- Receiver areas are large enough to absorb authorized TDRs.
- As-of-right base density in TDR receiving areas is zoned lower than the market demand for the type and density of housing that developers want to build.
- Developers in TDR receiver areas can achieve the desired market density only with TDRs.
- Density bonuses for using TDRs are sufficiently high to justify the increased cost of purchasing TDR.
- Buying TDRs is more profitable to developers than building to base density or alternative ways to achieve higher density in receiver areas.
- Purchasing TDRs and the public approval process of using them in receiver sites is faster and more predictable than alternative ways to achieve the desired density.
- Selling TDRs is reasonably competitive in value to landowners, considering the residual value of land restricted by TDR easements or covenants, with developing the sending site, selling an easement to other state or local PDR programs, or is the only alternative zoning allows.



- There is an active market for higher density housing types allowed with TDRs in receiver areas.
- The county takes steps to maintain TDR values that are attractive to buyers and sellers by adding TDR receiver capacity, purchasing TDRs, adjusting the TDR allocation rate (amount of TDR/acre or du/TDR), allowing TDRs for increases in non-residential floor area, or other means.

**B. The County has strong Comprehensive Plan and Zoning policies that support use of TDRs**

- The TDR program is established as part of a larger strategy to preserve land and redirect growth.
- Goals are established in the Plan for the types, location and amount of land to preserve.
- TDR sending areas are designated to protect the most valuable rural land, unique natural and historic resources, or other resources in the Plan's protection goals.
- TDRs are received only where the county and municipalities want development to occur.
- TDRs will not add new residences where they will contribute to the fragmentation of the best agricultural lands, conflict with existing farming operations or contribute to a sense of impermanence of farming in the community.
- TDRs help mitigate the perceived effects of downzoning, help gain support from landowners, and help avoid litigation over rezoning actions.
- Zoning limits or prohibits the use of development rights on the sending site, and reduces the as-of-right base density in receiver sites below the level of market demand.
- Zoning provides for additional density needed to accomplish comprehensive plan goals in receiver areas, only or primarily with the use of TDRs.
- The county adopts a policy that future increases in zoning density in receiving areas is allowed only with TDRs, until land preservation goals are met.
- County water and sewer plans anticipate and plan for development in receiving areas at the density needed to accommodate TDRs.
- Subdivision rules and procedures ensure that receiving area infrastructure is capable of absorbing development with TDR bonus density, including water and sewer service, septic systems, schools and roads.

**C. Administration of TDRs is simple, efficient and predictable**

- Buyers of TDR can obtain all approvals for their use in receiver sites with certainty and predictability, and can use TDRs for additional density as-of-right in receiver projects.
- Buyers and sellers of TDR are provided clear rules for use of TDRs in receiver areas and restrictions on using development rights on sending site.
- Buyers and sellers of TDR are informed about the current market values of TDRs.
- Receiver areas for TDR are designated and zoned for densities needed to absorb TDRs, without uncertain discretionary or conditional use review.



- TDRs are allowed on a gross land area basis; the number of TDRs authorized for sale is not reduced by environmental conditions for development on the sending parcel.
- Arbitrary rules limiting the transfer or use of TDRs are avoided (e.g. distance between selling and receiver sites, use of TDRs in the same political districts, etc.).
- Special rules for development in receiver areas do not discriminate against TDR projects.
- Land records, mapping and administration of TDRs are complete, maintained and publicly accessible.
- Restrictions on TDR sending sites are permanent, recorded in land records, used in the subdivision and zoning approval process, and sending sites are monitored for compliance.
- Lengthy delays in recording and using TDRs are avoided.
- Local government monitors and modifies TDR program as needed to improve effectiveness and efficiency, and adds receiving areas or increases their TDR capacity as needed to maintain demand.

**D. The TDR program has broad public support.**

- Rural landowners are motivated to protect land and farming as an industry, more than by profit from selling land for development; and they support TDRs, easement purchase programs and zoning to preserve agricultural uses.
- Real estate developers support TDRs to obtain increased density in receiving areas, and as a flexible and expedient alternative to purchasing additional land.,
- Farming, community and environmental groups support TDRs as one means to protect more land.
- TDR receiving site communities accept or support the density, design quality and compatibility of development using TDRs.
- Elected government officials accept TDRs as a viable method to protect land with private funds, protect the equity of rural landowners, control the location and quality of growth and implement the comprehensive plan.

With so many critiques of TDR programs and so much guidance about how to create successful TDR programs already available, the Land Preservation and TDR Workgroup decided not to add another voice to the chorus but to direct the reader to existing resources.

The following sources have been useful to the Workgroup. If you know of others that should be added, please send them to Daniel Rosen at the Maryland Department of Planning [drosen@mdp.state.md.us](mailto:drosen@mdp.state.md.us) (Also, please contact him for materials from MDP that are listed below.) The bibliography will be posted on line.

American Farmland Trust: Farmland Information Center. “Fact Sheet: Transfer of Development Rights.” Can be downloaded from [http://www.farmlandinfo.org/documents/37001/TDR\\_04-2008.pdf](http://www.farmlandinfo.org/documents/37001/TDR_04-2008.pdf)

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